FILED
SEP 17 1974
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-290

MAXINE W. SIEGFERTH, Guardian of ROBERT H. SIEGFERTH, an Incompetent Person, *et al.*,

Petitioners,

v.

BALTIMORE & OHIO RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD T. CUNNINGHAM
Amer, Cunningham & Brennan Co., L.P.A.
1500 First National Tower
Akron, Ohio 44308

Attorney for Petitioners

Of Counsel:

BERNARD J. AMER
Amer, Cunningham & Brennan Co., L.P.A.
1500 First National Tower
Akron, Ohio 44308

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IN THE

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No.

MAXINE W. SIEGFERTH, Guardian of ROBERT H. SIEGFERTH, an Incompetent Person, *et al.*,

Petitioners,

v.

BALTIMORE & OHIO RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Maxine W. Siegferth, Guardian, et al. v. Baltimore & Ohio Railroad Co., decided May 29, 1974, rehearing denied June 20, 1974. That judgment affirmed the judgment on the jury verdict of the United States District Court for the Northern District of Ohio, Eastern Division, in favor of the defendant-Respondent, entered March 21, 1973.

OPINIONS BELOW

An opinion of the United States District Court for the Northern District of Ohio, Eastern Division, was not rendered. The decision is attached as Judgment on Jury Verdict, Appendix A hereto. The decision of the Sixth Circuit Court of Appeals has not been reported. It is printed as Appendix B hereto. The decision of the Sixth Circuit Court of Appeals denying the Petitioner's motion for rehearing without opinion is attached as Appendix C hereto. Also found in the Appendices are the decisions of the United States District Court of the Northern District of Ohio, Eastern Division, in *Glinsey v. Baltimore & O.R.R.*, 356 F. Supp. 984 (1973), Appendix D hereto; and the opinion of the Sixth Circuit Court of Appeals reversing the District Court in that case, ___ F.2d ___ (1974), Appendix E hereto; and the Finding and Order in the case of *Carnahan v. Akron-Barberton Beltline Railroad*, Court of Common Pleas, Summit County, Ohio, Civ. No. 288126 (1973), Appendix F hereto.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(a) to decide questions of law arising under 28 U.S.C. §1652 and 45 U.S.C. §62 and invoked under the due process clause of the Fifth Amendment to the Constitution of the United States. The judgment of the United States District Court was entered on March 21, 1973. The judgment denying

Petitioners' motion for a new trial was entered on April 19, 1973. The judgment of the United States Court of Appeals was entered on May 29, 1974. The judgment denying Petitioners a rehearing in the Court of Appeals was entered on June 20, 1974.

QUESTIONS PRESENTED

I. Where the construction of a statute (Ohio Revised Code §§4955.32, 4955.33 and 4955.34) is an issue in a diversity case, should the Federal Court construe the statute as it has been construed by the Ohio lower courts; *or* can the Federal Court speculate as to how it thinks the State Supreme Court would rule on the construction in question as a matter of first impression?

II Should a Federal Court construe the Federal Hours of Service Act, 45 U.S.C. §62, in conformity with congressional intent to protect the traveling public and to provide that the common law defense of contributory negligence will not absolve liability for injuries directly resulting from a clear violation of the statute?

III. Can a Federal Court arbitrarily deny a remedy to a plaintiff by applying different standards to persons similarly situated, when such plaintiff comes within the class intended to be protected by a congressional enactment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of Amendment V to the Constitution of the United States, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This case also involves 28 U.S.C. §1652, which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

This case also involves the Federal Hours of Service Act, 45 U.S.C. §62, which provides:

> "(a) It shall be unlawful for any common carrier, its officers or agents, subject to sections 61 to 64b of this title –
>
> (1) to require or permit an employee, in case such employee shall have been continuously on duty for fourteen hours, to

continue on duty or to go on duty until he has had at least ten consecutive hours off duty, except that, effective upon the expiration of the two-year period beginning on the effective date of this paragraph, such fourteen-hour duty period shall be reduced to twelve hours; or

(2) to require or permit an employee to continue on duty or to go on duty when he has not had at least eight consecutive hours off duty during the preceding twenty-four hours.

Determination of Service

(b) In determining, for the purposes of subsection (a) of this section the number of hours an employee is on duty, there shall be counted, in addition to the time such employee is actually engaged in or connected with the movement of any train, all time on duty in other service performed for the common carrier during the twenty-four-hour period involved.

Wreck or Relief Trains

(c) The provisions of sections 61 to 64b of this title shall not apply to the crews of wreck or relief trains.

Applicability

(d) The provisions of this section shall not apply to an employee during such period of time as the provisions of section 63 of this title apply to his duty and off-duty periods.

Mar. 4, 1907, c. 2939, §2, 34 Stat. 1416; Dec. 26, 1969, Pub. L. 91-169, § 83 Stat. 463."

This case also involves the Ohio statutory construction statute, §1.11, R.C. which provides:

"Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws: but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature."

This case also involves the Ohio statute for minimum warning requirements at railroad crossings, §§4955.32, 4955.33 and 4955.34, R.C., which provide:

§4955.32 "Every company shall attach to each locomotive engine passing upon its railroad a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine in motion and approaching a turnpike, highway, or street crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve, or other obstruction to view, upon the same line with the crossing, and in the like manner where the railroad crosses any other traveled place, by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing and ring such bell continuously until the engine passes the crossing.

This section shall not interfere with the proper observance of an ordinance passed by the legislative authority of a municipal corporation regulating the management of railroads, locomotives, and steam whistles on locomotives, within the limits of such municipal corporation."

§4955.33 "At all points where its railroad crosses a public road at a common grade, each company

shall erect a sign with large and distinct letters placed on it to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive. Such signs erected or replaced after January 1, 1958, shall be treated with luminous material or equipped with reflectors so as to be visible during the time specified in section 4513.03 of the Revised Code, to the operator of a motor vehicle lawfully operated upon such public road. The director of transportation shall include the specifications of such luminous material or reflectors in the manual prescribed by section 4511.09 of the Revised Code. A company which neglects or refuses to comply with this section is liable in damages for all injuries which occur to persons or property from such neglect or refusal." §4955.34 "Every engineer or person in charge of an engine who fails to comply with section 4955.32 of the Revised Code is personally liable to a penalty of not less than fifty nor more than one hundred dollars to be recovered by civil action at the suit of the state in which the crossing is located.

The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person."

STATEMENT OF THE CASE

This railroad crossing case was commenced in the Court of Common Pleas of Summit County, Ohio, by Petitioners, Maxine W. Siegferth, as Guardian of her permanently injured husband (hereinafter referred to as

"Siegferth"), and for herself for loss of consortium and support. The Baltimore & Ohio Railroad Co., Respondent (hereinafter referred to as "Railroad"), caused the case to be removed to the District Court of the United States for the Northern District of Ohio, Eastern Division, on the grounds of diversity, where it was tried before a jury of six (6).

The issue presented is whether the violation of §§4955.32 and 4955.34, R.C., prescribing audible warnings by trains at crossings, as well as the violation of the Hours of Service Act, 45 U.S.C. §62, imposes absolute liability on the Railroad, or merely negligence per se. If the former, the defense of contributory negligence is not available.

The District Court sustained the Railroad's contention, refused to charge on absolute liability, and charged on negligence and contributory negligence, with the obvious result that the jury returned a verdict for the defendant.

The events giving rise to this action occurred at about 4:00 o'clock P.M., on a dull, snowy day in December, 1969, at a railroad crossing located in Northampton Township, Summit County, Ohio. This crossing was then protected by only one crossbuck sign. The highway that crosses these railroad tracks is Smith Road, which is a heavily traveled paved road in Summit County, running in an east-west direction and servicing the urban area of Akron. The tracks run in a generally north-south direction near the crossing. From a westbound highway traveler's point of view to the north, there is a bend in the track and there are weeds, bushes, and trees which Petitioners maintained ob-

structed the view of drivers attempting to make this crossing.

The evidence is undisputed that Siegferth, age 53, drove his automobile on Smith Road at a speed of no more than twenty (20) miles an hour; and as he approached the crossing, he stopped, rolled down his right window, and looked to his right (north), for an approaching train. In fact, it was admitted by counsel for the Railroad, the Siegferth stopped about ten or fifteen feet from the track and looked for an approaching train.

As Siegferth was so stopped, the Railroad's train was approaching this crossing from the north. There is positive testimony that, as the train made this approach, the train crew failed to ring its bell, and only blew its whistle for the first time just before Siegferth went upon the crossing - all in violation of §§4955.32 and 4955.34, R.C. The facts are further undisputed that this train crew was going home to New Castle, Pennsylvania, on its last run before the Christmas holiday. They had been working seventy (70) hours a week; and had worked more than nineteen (19) continuous hours the day before (commencing at 8:00 o'clock A.M. on December 22, 1969, and ending at 3:20 o'clock A.M., December 23, 1969) - all in violation of the Hours of Service Act, Chapter 45 U.S.C. §62.

The engineer was so inattentive to his duties after his extended time on the job that he failed to observe two cars which crossed the tracks before the moment of impact with the third car, that of Mr. Siegferth, which car he also failed to notice. Moreover, the other two lookouts (fireman and brakeman) in the locomotive did

not see the first car cross the tracks; and, even though they saw both the second car and that of Siegferth, they were so inattentive to their duties that they failed either to inform the engineer of the danger at the crossing or to sound appropriate warning signals to those crossing the tracks.

As Siegferth pulled slowly onto the track, the inevitable collision resulted. As a result of the collision, Siegferth was hurled violently against the interior of his car, sustaining severe and permanent injuries. He was hospitalized in Akron, Ohio, until he was removed to a nursing home where he is still a patient. His injuries consisted of a cerebral contusion, cerebral hypoxia, fractured pelvis, fractured cervical vertebrae, fractured thoracic cage, fractured clavicle, and multiple abrasions and lacerations. He is now permanently quadriplegic, unable to speak, and unable to have any useful body functions. There is no hope of any improvement in his condition.

The parties stipulated that at the time of the accident, Siegferth was receiving an annual salary of $52,000.00; that at 53 years of age, his life expectancy was 16.7 years; and that his pre-trial medical expenses were $41,336.00, and were increasing at a minimum of $40.00 a day for the rest of his life. The special damages approximate One Million Dollars ($1,000,000.00).

REASONS FOR GRANTING THE WRIT

I.

WHERE THE CONSTRUCTION OF A STATUTE (OHIO REVISED CODE §§ 4955.32, 4955.33 and 4955.34) IS AN ISSUE IN A DIVERSITY CASE, SHOULD THE FEDERAL COURT CONSTRUE THE STATUTE AS IT HAS BEEN CONSTRUED BY THE OHIO LOWER COURTS: *OR* CAN THE FEDERAL COURT SPECULATE AS TO HOW IT THINKS THE STATE SUPREME COURT WOULD RULE ON THE CONSTRUCTION IN QUESTION AS A MATTER OF FIRST IMPRESSION?

If one begins with the well-settled rule that *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires a federal court sitting in a diversity case to apply the applicable law of the forum state, there can be no question but that the District Court, as well as the Court of Appeals, was bound to apply current Ohio law to the facts of this case. The defendant railroad duly exercised its right to remove the cause from the Courts of the Ohio Ninth Appellate District, which includes the Courts of Summit County, 28 U.S.C. §1441, and as will be more fully explained in the pages which follow, the mere fact that the cause was removed to the federal court at all was a major factor contributing to the final outcome of this case.

The reasoning of the *Erie* case is sound and was best expressed by Mr. Justice Frankfurter in *Guaranty Trust v. York*, 326, U.S. 99 (1945):

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as if it would be tried in a state court. *The nub of the policy that underlines Erie RR Co. v. Tompkins is that for the same transaction, the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away, should not lead to a substantially different result.* (Emphasis added)

The rights of resident parties cannot and should not turn upon forum shopping by a non-resident party. Such reasoning underlies this Court's unfailing implementation of the statutory command that it is state law which determines the state-created rights of the parties in a diversity action. 28 U.S.C. 1652; *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

It is therefore the duty of the federal courts to make every effort to ascertain the provisions of current state law and, if necessary, to decide matters of first impression. *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943). Where a state's highest court has not resolved a question of applicable state law, a federal court is required to follow the decisions of all state courts, especially those of its Courts of Appeal. *Fidelity Union Trust v. Field*, 311 U.S. 169 (1940); *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940); *Six Companies of California v. Joint Highway District*, 311 U.S. 180 (1940); *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940). When there are

lower court cases which deal directly with the issues in question, the federal court is not under any obligation to guess or to predict the reaction of a state's highest court to a new trend or novel argument. Lower courts and intermediate courts of appeal, no less than the supreme court, act as "organ(s) of the state and their determination in the absence of more convincing evidence of what state law is should be followed by a Federal Court in deciding a state question". *Fidelity Union Trust, supra* at 177.

In the case *sub judice* there is presented to this Court a classic case of forum shopping. The state courts of origin in this diversity case would clearly have ruled in plaintiff's favor, and at least one federal district judge would have done the same. See *Glinsey v. Baltimore & O.R.R.*, 356 F. Supp. 948 (1973), *rev'd* ___ F.2d ___ (1974). The record on appeal reveals the divergence of opinion in the federal court system itself on the novel issue presented them in these cases.

There is hardly a consensus among the lower federal courts and the Sixth Circuit on this important issue of state law. Taking these facts into consideration, this case offers to this Court an opportunity to further clarify the rule of *Fidelity Union, supra.*

In the eyes of the Sixth Circuit, the *Glinsey* case was determinative of the outcome of the instant case. Therefore, the validity of the decision in the instant case stands or falls upon the validity of the Sixth Circuit's reasoning in *Glinsey*.

Prior to any decision or appeal either in the instant case or in *Glinsey*, it was apparent that the duty of care imposed by law upon railroads operating within the State of Ohio was in a state of flux. Taking the lead in

the development of stricter standards by which to judge railroad compliance with its duty to the traveling public were the courts of Summit County and the Ninth Ohio Appellate District, the forum in which the instant case arose. See *McCallie v. New York Central R.R.*, 230 Ohio App. 2d 152 (1969); *Carnahan v. Akron-Barberton Beltline R.R.*, (Appendix F hereto), Court of Common Pleas, Summit County, Ohio, Civ. #288126 (filed December 10, 1973 and settled thereafter). The law of Ohio, as it pertains to the minimum audible and visual warning signals at railroad grade crossings is found in Ohio Revised Code, §§ 4955.32, 4955.33 and 4955.34. Interpreting these sections, the courts have found that the plain meaning of the statutes impose absolute liability upon the railroad for failure to comply with the command of the statutes. In *McCallie*, the Ninth District Court of Appeals held that a failure by the railroad to erect the minimum *visual* warning required by 4955.33 R.C.– a crossbuck sign–eliminates the availability of the common law defense of contributory negligence. The statute reads in relevant part:

> A company which neglects or refuses to comply with this section is *liable in damages for all injuries which occur to persons or property from such neglect or refusal.* (Emphasis is supplied)

Similarly, the Summit County Court of Common Pleas, in *Carnahan v. Akron-Barberton Beltline R.R.*, *supra*, an action involving the minimum *audible* warning requirements prescribed by Ohio Revised Code §§4955.32 and 4955.34, ruled that the words of §4955.34, R.C.,

> The company in whose employ such engineer or person in charge of an engine, as well as the person himself, *is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person.* (Emphasis supplied.)

negate the availability of the defense of contributory negligence in an action arising under those sections.

The learned trial judges in *Glinsey* and *Carnahan* found the issue presented by a joint reading of §§4955.32 and 4955.34, R.C., to be one of first impression in the State of Ohio. It was, therefore, incumbent upon the federal courts to follow the lead of the relevant state decisions on this point, since these courts have full powers to state the law of Ohio. Ohio Const., Art. IV, §§3, 4; 28 U.S.C. 1652; *West v. American Telephone and Telegraph*, 311 U.S. 223 (1940). The *West* case is particularly appropriate here, for in that case, the Sixth Circuit refused to follow the judgment of the Ohio courts and attempted to justify its decision on the grounds that the Ohio Supreme Court had not spoken on the matter. Reversing the Sixth Circuit this Court wisely held that:

> Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the Ohio Court of Appeals, whether that will ever happen remains a matter of conjecture. In the meantime, the state law applicable to these parties has been authoritatively declared by the highest state court in which a decision could be had . . . and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think the State Supreme Court may establish a different rule in some future litigation.

In the instant case, this court is presented with an even more extreme situation. The court of appeals in *Glinsey* (at footnote 5), conceded that the arguments in favor of the emerged Ohio view were most persuasive and the plain meaning of the statute required the acceptance of that viewpoint. However, the Sixth Circuit went so far as to deny its authority to interpret Ohio law, a conclusion clearly erroneous in light of this Court's statement in *Meredith, supra*, that it is the duty of a federal court to decide questions of state law whenever necessary to the rendition of a judgment. If this were not the case, the parties to a diversity action would be deprived of the alternative forum provided by the diversity jurisdiction of the federal courts. Recent cases have recognized the importance of following recent trends in state law, e.g. *Middle Atlantic Utilities Co. v. SMW Development Co.*, 392 F.2d 380 (1968), (2d Cir.); and the late Mr. Justice Black, speaking for the Court in *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), at 633, recognized that federal courts have been given too little freedom to adapt to current trends in state law. Why the Sixth Circuit Court of Appeals held itself so constrained in the instant case is indeed a puzzlement.

An examination of the "law" upon which the Sixth Circuit Court of Appeals denied this plaintiff recovery clearly shows the extent of its error. Ohio is one of a very few states which adheres to the view that the syllabus of its Supreme Court decisions, rather than to the Court's opinion, states the "law" of the case. §2503.20, R.C.; *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), *reh. den.*, 343 U.S. 917 (1952); *Cassidy v. Glossip*, 12 Ohio St. 2d 17

(1967). It is easy, however, to give too much weight to the syllabus and, in so doing, ignore the plain language of Rule VI of the Ohio Supreme Court which so severly limits its effect:

> A syllabus of the points decided by the Court in each case . . . *shall be confined to the points of law*, arising from the case, *that have been determined by the Court* . . . (Emphasis added) See 167 Ohio St., at xviii.

It is well-settled that the rules stated in the syllabus must be interpreted with reference to the facts of each case and the questions considered by the Court. Therefore, the syllabus may not be given any greater weight than the facts of the particular case warrant. *In Re Poage*, 87 Ohio St. 72 (1912). A reported decision is entitled to no consideration whatever as settling by judicial determination a principle not passed upon or raised by the adjudication, *even though the question might have been raised. State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 (1952), followed in *Shaw v. Chell*, 176 Ohio St. 375 (1964). Questions not considered are as if they were not in the case at all. *State v. Pugh*, 43 Ohio St. 98 (1886). In *Baltimore & O.R.R. v. Henery*, 235 F2d 770 (1956), the Sixth Circuit itself followed this rule, recognizing that before the syllabus is binding precedent the case must be "on all fours."

The failure of the Court of Appeals to apply this well-settled rule in the instant case is all too apparent. This court held, in *Fidelity Union Trust, supra*, that the federal courts are bound by the decisions of lower courts "in the absence of more convincing evidence of what state law is." But what is this "more convincing evidence" of state law in the instant case? The Court of

Appeals relied heavily on the syllabi of cases such as *Pennsylvania R.R. v. Rathgeb*, 32 Ohio St. 66 (1877), *North v. Pennsylvania R.R.*, 9 Ohio St. 2d 196 (1967), *Boles v. Baltimore & O.R.R.*, 168 Ohio St. 551 (1959), and *Zumetz v. Baltimore & O.R.R.*, 27 Ohio St. 2d 71 (1971), but an examination of those cases reveals that the exact point of law facing the court in the instant case was never an issue. To base its decision as to the current status of Ohio law upon cases where the issue was never considered ignores the elementary legal principle that courts have no authority to decide questions not presented for their consideration. Had the Court of Appeals engaged in the thorough examination of Ohio law required by *Fidelity Union Trust* it could not have ignored the findings of the Summit County Court of Common Pleas in *Carnahan v. Akron-Barberton Beltline R.R., supra*, which findings were presented to the court on appeal. In those findings and order filed December 10, 1973, the court stated:

> This Court finds that there is no Ohio case which specifically discusses the combined effect of the statutes in the myriad of reported authorities cited by defendant or otherwise. Granted, there are many cases deciding the effect of Section 4955.32 Ohio Revised Code singularly. Therefore the court concludes that the issue raised is a matter of the first impression to which the court may direct its own judgment.

It is all too apparent that the Court of Appeals has failed to comply with the holdings of this Court in the *Erie* and *West* cases. As a result of the divergent views upon the question of whether or not §§4955.32, 4955.33 and 4955.34, R.C. construed together negate

the defense of contributory negligence, there now exists in this important area of railroad safety standards substantial doubt as to the true meaning of Ohio law. Clearly, a railroad faced with an adverse ruling by an intermediate court of appeal on the aforementioned issue will not desire a definitive statement on the issue from this state's highest court, for that would fix the rule as solidly as if the legislature had acted.

That this may have been the case in *McCallie* and *Carnahan* is not revealed by the record in those cases, but it is, nevertheless, a reasonable supposition. Petitioners respectfully appeal to this Court to issue a writ of certiorari to clarify the law. The *Glinsey* case will undoubtedly be cited by other courts as a definitive statement of Ohio law, notwithstanding the fact that the Court of Appeals itself did not subscribe to the views it was propounding. What is needed is a thorough examination of the relevant Ohio law of the kind suggested by this court in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), wherein the Court stated:

> Where the question in doubt or deserving of further canvas we would, of course, remand the case to the Court of Appeals to pass on this question of (State) law.

Unlike the situation on the *Bernhardt* case, however, there *is* in the instant case a developing line of authorities which "casts a shadow over established ones", as well as a considerable conflict of opinion between the judges of this state and the judges of the federal courts. A failure to grant the writ will have the undesirable effect of leaving those plaintiffs unfortunate

enough to be injured through the negligence of a foreign corporation subject to a stricter interpretation of Ohio law in the federal courts than that which would have been applied by the courts of Ohio. In addition, a failure to grant the writ would leave the federal courts of this state in the awkward position of strictly construing a remedial statute which, under Section 1.11 of the Ohio Revised Code, should have been liberally construed. For all these reasons, the writ should be granted.

II.

SHOULD A FEDERAL COURT CONSTRUE THE FEDERAL HOURS OF SERVICE ACT, 45 U.S.C. §62, IN CONFORMITY WITH CONGRESSIONAL INTENT TO PROTECT THE TRAVELING PUBLIC AND TO PROVIDE THAT THE COMMON LAW DEFENSE OF CONTRIBUTORY NEGLIGENCE WILL NOT ABSOLVE LIABILITY FOR INJURIES DIRECTLY RESULTING FROM A CLEAR VIOLATION OF THE STATUTE?

The facts of this case are undisputed as they relate to the defendant-Railroad's violation of the Hours of Service Act, 45 U.S.C. §62 (1969). The crew involved in this tragic occurrance had been required to work continuously for nineteen (19) hours and twenty (20) minutes (8:00 o'clock A.M., December 22, 1969, to 3:20 o'clock A.M., December 23, 1969). The same crew had been averaging seventy (70) hours per work week and were clearly tired as their train approached the crossing on December 23, 1969. The consequent

inattentiveness was clearly a contributory direct cause of the collision.

The question presented to this Honorable Court for determination is whether or not a federal court in the face of a clear congressional intent to assure the health and safety of the traveling public is bound to respect this intent in its determination of issues falling within the ambit of a federal regulatory program designed to accomplish this goal. It is clear, from prior congressional action concerning the maximum work hour permissable for employees of carriers, that the hazards to the public of tired or inattentive employees is so great that violations of these statutes resulting in injury will result in imposition of liability notwithstanding contributory fault, but liability is apportioned through the theory of comparative negligence. As will be set out in the argument which follows, it is clear that whenever Congress desires to impose national standards for liability or risk allocation in areas over which it has control, contributory negligence has no place; for to allow such an absolute defense would frustrate the very ends to be accomplished.

The first legislation to regulate the maximum hours which a railroad employee may remain on the job without rest became a part of the law of the United States in 1907. That legislation, 34 Stat. 1416, the original version of present 45 U.S.C. §62, provided that the maximum number of hours in any working day was not to exceed sixteen (16). Since that time, Congress, in its wisdom, has seen fit to lower the length of time such employees may work, first to fourteen (14) hours in 1970, and thence to twelve (12) hours, effective in December, 1972. The legislative history of these

enactments are plain: the law was intended to protect members of the traveling public, as well as railroad employees from the dangers of dealing with or being exposed to railroad equipment which, by its nature, is capable of doing great harm if not controlled by those who are alert and attentive to their duties. *See 1969 U.S. Code Congressional & Administrative News*, p. 1636. That Congress was fully cognizant of the interests they were attempting to protect can hardly be doubted, for in testimony in proposed revisions of the statute held in 1966 the purpose of the statute was stated as follows (quoting from Judge Clark (later Justice Clark) in *United States v. Baltimore & O.R.R.*, unreported):

> Now, gentlemen of the jury, *this law is a very important one. It does not concern the workmen alone; it concerns first of all the safety of the public* . . . and the theory of the law is that safety is being best promoted when the men who operate the trains are not exhausted or sleepy when on duty. We all know that there comes a stage of exhaustion to us all when we become indifferent to our surroundings, and at such time we do not have a due appreciation of them, certainly not such as every man should have who is employed in the operation of a railroad.
>
> It is also the purpose of the law to protect the employees so that they may not be killed or injured in the course of their duties as a consequence of being weary and heavy laden with hours of service. (Emphasis added.)

Hearings on Hours of Service of Railroad Employees. Subcommittee on Surface Transport (Senate Commerce Committee) p.63.

In short, the statute was designed to protect human

life and promote railroad efficiency by reducing the dangers to the public incident to the strain of excessive hours spent on duty by the train crew. *U.S. v. Great Northern R.R.*, 248 F. Supp. 88 (1964). So strong was this intent on the part of Congress that the railroad is not permitted to invoke the defense of contributory negligence in an action by an employee for injuries caused by a violation of the statute, but rather, the theory of comparative negligence is invoked to measure damages. (Federal Employer's Liability Act) 45 U.S.C. §53. Likewise, in other areas of the transportation industry congressional intent that the public not be exposed to the extreme hazards of inattentive or lethargic employees is abundantly clear. *See* e.g., 46 U.S.C. §235; Death on the High Seas, Act 46, U.S.C. §761 et seq.; Federal Employers Liability Act, 45 U.S.C. §51 et. seq.; Federal Aviation Act. 49 U.S.C. §1301 et. seq., and regulations thereunder; Federal Aviation Regulations §121.503, 127.191; Jones Act, 46 U.S.C. 688. In each of the foregoing situations Congress has made a judgment that the duty of care imposed by the safety standards enacted for the benefit of all persons endangered by exhausted and inattentive employees is not supposed to be lessened by the absolute common law defense of contributory negligence. *See e.g.* 46 U.S.C. §766; *Krause v. Sud–Aviation, Societe Nationale Constructiones Aeronautiques*, 301 F Supp. 513 (1968), aff'd 413 F.2d 428 (1969). To hold otherwise would be to absolve a carrier or its agents from liability in damages for injuries resulting from a violation of a statutory duty. So strong in fact is this duty to have alert employees at the controls, that courts construing legislation similar (e.g. 46 U.S.C.

235) to the railroad hours of service limitations have held the carrier who violates them to the strictest standards of conduct as well as of proof. In *The Delani*, 105 F.2d 413 (1939), *cert. den. sub. nom., Alaska S.S. Co. v Pacific Coast Coal Company*, 311 U.S. 687 (1940), it was held that a carrier not only has the burden of proving that the violation "probably did not but that it could not have contributed to the collision."

There is no federal statute which expressly provides standards to govern a civil action under the Hours of Service Act, 45 U.S.C. §63. To this extent, the Court is faced with a situation analogous to that facing the Court under §§14(a) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§78n(a), 78aa. In *J.I. Case v. Borak*, 377 U.S. 426 (1964), this Court held that it is the duty of the federal courts to be alert to provide the remedies necessary to effectuate congressional purpose, stating at 433:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination are nevertheless federal questions, the answers to which are to be derived from the federal policy which it has adopted.

The statute involved in the instant case has been a part of the federal regulatory program for the conduct of railroads since 1907. Only recently in the Railroad Safety Act of 1970, 45 U.S.C. §421 et. seq., the Congress reaffirmed its longstanding commitment to safety in all areas of railroad operation stating in 45 U.S.C. §421:

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad

> operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

In furtherance of this elusive goal, the Congress has declared that "laws, rules, and regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. §434. To this end, the states may enact standards to govern railroad operations, but only if the laws are more stringent than their federal counterparts.

Although the nation's railroad's were not governed under the provisions of the 1970 legislation at the time this action arose, the passage of the act a mere three (3) days after the accident is strong evidence of the continuing nature of congressional concern with this extremely important area of public policy. In such a situation it is the duty of the common law court to perceive the intent of the legislature and interweave that policy into the body of the common law. This is especially so when there exists not merely an isolated piece of legislation, but rather a course of legislation dealing with a series of situations–here railroad safety–where the generality of the underlying principle is not open to dispute. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). As was the case in *Moragne*, there can be little doubt that Congress did not intend to preclude a civil remedy for injuries of persons in petitioner's situation. *J.I. Case v. Borak, supra.* See also, *Sea-Land Services, Inc. v. Gaudet*, ___ U.S. ___, 94 S.Ct. 806 (1974).

The standards to be applied then when the duty imposed by a federal regulatory program is breached

should be federal, rather than state standards, especially in the face of an express congressional desire that railway safety be governed by national standards. 45 U.S.C. §434. This principle was accepted by the Court as recently as last year in *United States v. Little Lake Miserle Land Co., Inc.*, 412 U.S. 591 (1973). In reaffirming the significance of *Clearfield Trust Co. v. U.S.*, 318 U.S. 363 (1943), it was held that where the issue is one which arises from and bears heavily upon a federal regulatory program, the choice of law is one for the federal courts. Since *Erie R.R. v. Tompkins, supra,* and as a corollary of that decision, the Court has recognized that what might be an "ordinary" or "local" occurance as between private citizens, may raise serious questions of national public policy when they arise in the context of a specific statutory provisions. *Little Lake Miserle Land Co., supra.* See also, Mishkin, *The Variousness of Federal Law:* Competence & Discretion in the Choice of National and State Rules for Decision. 105 U. Pa. L. Rev. 197 at 802 & r.19 (1957).

Petitioners pray that the writ of certiorari issue to the Sixth Circuit so that this Court may declare as a matter of common law those rules which are necessary to effectuate the statutory pattern of railroad safety established by the Congress. The federal courts are competent to declare the policy of federal regulatory programs and the instant case provides ample opportunity for the Court to do so.

III.

CAN A FEDERAL COURT ARBITRARILY DENY A REMEDY TO A PLAINTIFF BY APPLYING DIFFERENT STANDARDS TO PERSONS SIMILARLY SITUATED, WHEN SUCH PLAINTIFF COMES WITHIN THE CLASS INTENDED TO BE PROTECTED BY A CONGRESSIONAL ENACTMENT?

As has been shown by the foregoing, it was the intention of Congress by the enactment of the Hours of Service Act to protect not only the railroad employees from the dangers inherent in its violation, but to protect the members of the traveling public as well. Such intention to protect the public was demonstrated with respect to various other federal acts and regulations heretofore cited which set the standards of care for common carriers. The class of persons to be benefited by the Hours of Service Act is not only the train crew, nor even the traveling public, but all the persons who would forseeably be injured as a result of violations of that Act. Such classification would seem to be the only reasonable construction that could be placed upon the Act, since obviously Congress would hold the welfare of the traveling public no less dear than the members of the train crew. If Congress actually had only one group in mind to protect, it would likely have been the traveling public, since the possibility of serious injury resulting from a tired and inattentive train crew is so much greater for the traveling public, where, as in the instant case, a passenger car collides with a locomotive, or where, in the case of a collision between passenger trains, the

injury to the traveling public would be greater by shear numbers.

In the case of injuries to the members of the crew as a result of the violation of the Act, Congress has expressly abrogated the defense of contributory negligence as a bar to recovery in favor of the theory of comparative negligence. Fed. Emp. Liab. Act, 45 U.S.C. §53. Such affirmative action on the part of Congress does nothing to detract from the applicability of the Hours of Service Act to the traveling public, nor the duty of the federal courts to provide an equivalent remedy for all members of the protected class. To apply the doctrine of comparative negligence to some members of the class and leave other members remediless by reason of contributory negligence would be an arbitrary, capricious, and unreasonable discrimination which would constitute a denial of due process of the law in violation of the Fifth Amendment of the United States Constitution.

This Court has often pointed out that the tests as to the validity of federal action under the due process clause of the Fifth Amendment involve application of the same rules as to classification which are applied to state action under the equal protection clause of the Fourteenth Amendment. *See e.g. N.L.R.B. v. Jones and Laughlin Steel Corp.*, 334 U.S. 1 (1947); *Detroit Bank v. U.S.*, 317 U.S. 329 (1943.)

The application of different rules as to the availability of the defense of contributory negligence to railroad employees and the traveling public has no rational basis, especially in light of the fact that, if a classification were to be made at all, it should be in

favor of the traveling public, i.e., those members of the entire class most in need of protection.

The general rule is well settled that a classification to be valid must rest upon material differences between the persons included and excluded, and, furthermore, must be based upon substantial distinctions. *See, e.g., Old Dearborn v. Seagram Distillers*, 299 U.S. 183 (1936); *Walters v. St. Louis*, 347 U.S. 237 (1947). Likewise, the classification must be based upon proper and justifiable differences, considering the purpose of the law. *Louisville and Nashville R.R. v. Melton*, 218 U.S. 36 (1910). In the instant case, there is no substantial distinction between the traveling public and railroad employees to warrant discriminating between these various members of the same protected class, i.e., those who would forseeably be injured by violation of the Act.

Therefore, the Federal District Court and the Court of Appeals erred in applying a different rule of recovery to petitioners than would have been applied to a member of the train crew had he been injured as a result of the same collision.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court for the Northern District of Ohio, Eastern Division.

Respectfully Submitted,

RICHARD T. CUNNINGHAM
Amer, Cunningham &
Brennan Co., L.P.A.
1500 First National Tower
Akron, Ohio 44308
(216) 762-2411
Attorney for Petitioner

Of Counsel:

BERNARD J. AMER
Amer, Cunningham &
Brennan Co., L.P.A.
150[illegible]rst National Tower
Ak[illegible], Ohio 44308
(216) 762-2411

APPENDIX A

JUDGMENT ON JURY VERDICT

(Filed March 21, 1973)

This action came on for trial before the Court and a jury, Honorable Ben C. Green, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the defendant,

It is Ordered and Adjudged that the complaint herein is hereby dismissed at plaintiffs' costs.

Dated at Cleveland, Ohio, this 21st day of March,

/s/ Ben C. Green

United States District Judge

APPENDIX B

No. 73-1820

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Maxine W. Siegferth, Gaurdian of Robert H. Seigferth, an Incompetent Person, et. al.,
Plaintiffs-Appellants,

v.

The Baltimore and Ohio Railroad Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed May 29, 1974.

Before: Phillips, Chief Judge, Edward and Lively, Circuit Judges.

Per Curiam. Appellant is the guardian of her husband who was permanently injured and completely disabled when his car was struck by a B&O Railroad Co. freight train on December 23, 1969. Appellant's lawyer sought the same strict liability instruction pertaining to the Ohio Whistle and Bell Statute which was sought and given in *Glinsey v. B&O Railroad Co.*, 356 F. Supp. 984

(N.D. Ohio 1973), and he now claims reversible error in the fact that the District Judge in this case denied same and gave an instruction on contributory negligence. Thus, the issues in this appeal are identical with those in the *Glinsey* case except that here, without the strict liability instruction, the jury found no cause for action on the part of the appellant.

The *Glinsey* appeal has just been decided by another panel of this Court. The District Court judgment therein was reversed, and the strict liability instruction was disapproved. *Glinsey v. B&O R.R.* ___ F.2d ___ (6th Cir. 1974) (No. 73-1545, decided and filed April 16, 1974). On the basis of the reasoning and conclusions in *Glinsey, supra* and finding no other issue of merit, the judgment of the District Court in our instant case is affirmed.

APPENDIX C

No. 73-1820

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed
Jun 29 1974
JOHN P. HEHMAN, Clerk
[Caption omitted in printing]

ORDER

Before: PHILLIPS, Chief Judge, EDWARDS and LIVELY, Circuit Judges.

On consideration of the petition for rehearing in the above-styled case; and

Noting nothing material therein which was not considered by this court before the issuance of its opinion,

Said petition for rehearing is hereby denied.

Entered by order of the Court
/s/ John P. Hehman, Clerk
John P. Hehman, Clerk

APPENDIX D

Levorne GLINSEY, Admx. of the Estate
of Willie James Glinsey, Deceased,
et al., Plaintiffs,
v.
Baltimore & Ohio Railroad Co.,
Defendant.
No. C 70-735.

United States District Court,
N.D. Ohio, E.D.
March 30, 1973.

Railroad crossing accident. The District Court, Battisti, Chief Judge, held that Ohio statutes requiring trains to give certain audible signals at crossings and providing that failure makes railroad liable to person or company injured impose absolute liability and that contributory negligence does not bar recovery.

Order accordingly.

* * *

Donald P. Traci, Cleveland, Ohio, for plaintiffs.

Charles Clarke, Henry Light, Cleveland, Ohio, for defendant.

MEMORANDUM OPINION AND ORDER

BATTISTI, Chef Judge.

This cause presents a question of law which must be determined prior to trial: Whether the absence of statutory railroad signals imposes srtict liability upon the defendant for the loss proximately caused by

violation of ORC §§ 4955.32 amd 4955.34, so that contributory negligence is not a defense.

Section 4955.32 reads:

"Every company shall attach to each locomotive engine passing upon its railroad a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine in motion and approaching a turnpike, highway, or street crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve, or other obstruction to view, upon the same line with the crossing, and in like manner where the railroad crosses any other traveled place, by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing and ring such bell continuously until the engine passes the crossing."

Section 4955.34 reads in pertinent part:

"Every engineer or person in charge of an engine who fails to comply with section 4955.32 of the Revised Code is personally liable . . .

" . . . The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, *is liable in damages to a person or company injured in person or property by such neglect or act* of such engineer or person." (Emphasis added)

[1,2] If a particular state prescribes a standard of care which all persons, or a general class, must exercise, then violation is generally considered negligence per se. Where liability is bottomed on negligence, contributory negligence and assumption of risk are valid defenses.

and one who participates in the prohibited activity cannot recover.

[3] These statutes read together by their very terms impose a standard of conduct and impose an absolute liability. Therefore, should the plaintiff show that the activity occurred, contributory negligence may not bar any recovery.

Ohio has several such absolute liability statutes. One is Section 3719.30 prohibiting the deposit of poison on a street, common alley or in another's yard. It concludes: "Whoever violates this section shall be liable to the person injured for all damages sustained thereby." This statute, however, has never been interpreted in an injury case, so it gives us no guideline for decision.

A second statute has been interpreted in cases similar or analogous to the case at bar. The so-called "Dog-Bite" statute is an absolute liability statute. The old form of the statute, Section 5838 Gen. Code, provided:

> "A dog that chases, worries, injures or kills a sheep * * * or person, can be killed at any time or place * * * The owner of harborer of such dog shall be liable to a person damaged for the injury done."

The Dog Bite Statute said simply, "liable" which is exactly the words used in §4955.34. In Bevin v. Griffiths, 44 Ohio App. 94, 184 N.E. 401 (Lorain County Court of Appeals, 1932), a domestic servant in the household, who herself fed and tended the dog for the owner, was injured by the dog. The servant sued the owner, under the Ohio statute. The defnese contended that the servant, who was a harborer of the dog, could not take advantage of the strict liability

against the owner. The Court of Appeals, at page 98, 184 N.E. at page 403, held that strict liability must be applied:

> "There is no language in the statute that tends to indicate an intention that a servant shall not be considered 'a person' to whom a right of action is given by the statute.
>
> "In the case at bar, we sympathize with counsel for the defendant in their contention that the Legislature did not intend by said statute to make the owner or harborer liable to his servant for the consequences of an injury caused by a dog in the manner in which this injury was caused, but whether an owner or harborer of a dog should be liable for an injury inflicted or caused by his dog under any and all circumstances is a legislative and not a judicial question."

In Siegfried v. Everhart, 55 Ohio App. 351, 9 N.E.2d 891 (Summit County Court of Appeals, 1936) where contributory negligence was urged as a defense to the old Dog Bite Statute, the Court said at 353, 9 N.E.2d at 892:

> "The language of the statute is plain and unambiguous and contains no such exception. The general rule is that, where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and in such case it is not the province of a court to introduce an exception by construction."

The Supreme Court of Ohio passed on this same statute in Dragonette v. Brandes, 135 Ohio St. 223, 20 N.E.2d 367 (1939). In that case plaintiff went between two fighting dogs to separate them, trying to protect his son's dog. Defendant's dog bit off part of his

thumb. Plaintiff recovered in the trial court. The Appellate Court reversed, saying that the statute "[did] not contemplate liability under the facts of this case where * * * the plaintiff was at fault in bringing the dog bite upon himself."

The Supreme Court reversed, quoting the language that the owner "shall be liable to a person damaged for the injury done" and saying:

> That section imposes an absolute liability upon the owner of a dog, and scienter, fault, negligence or *contributory negligence* are not involved in a proceeding thereunder." 135 Ohio St. 224, 20 N.E.2d 368 (Emphasis added)

The Dog Bite Statute has since been amended by ORC §955.28 to say that the owner or keeper is liable "unless the damage or injury to the body or property of a person who, at the time such damage or injuries were sustained, was committing a trespass on the property of the owner, or was teasing, tormenting, or abusing such dog on the owner's property."

It is notable that under §955.28 which spells out certain exceptions, that plaintiffs in *Dragonette* and *Bevin* would still recover.

The amendment of the statute has relevance on the point of statutory construction which obtains in Ohio is that if the language used is clear and unambiguous, then no interpretation is necessary. The function of the Court is not to determine what the Legislature might have intended to enact if it had thought about an exception, but rather to determine the meaning of the language of the statute.

The old Dog Bite Statute said: "The owner or harborer of such dog shall be liable to a person

damaged for the injury done."

Another statute imposing strict liability is ORC Section 3743.33, which relates to the use of fireworks. It states that where fireworks are used the "parties in charge of such exhibitions shall be held strictly responsible for any damage to persons or properties resulting from the use of fireworks so used."

The language is similar, clear, unambiguous, and is stated without exception. The only issues to be determined are: Whether the defendant is a party in charge of the exhibition, and did the damage to a person result from the use of the fireworks used in the exhibition.

[4] In the case of a safety statute which is merely penal in its terms, absolute liability will be imposed if the injured person is one of the class designed to be protected, regardless whether he is an employee, an independent contractor or a participant. The railroads are quite familiar with the principle and application of the legal concept of strict liability, enforced for many years under the Safety Appliance Act.

[5] A violation of the safety statute imposes absolute and unqualified liability. The United States Supreme Court has held repeatedly that even though the employee negligently uses a defective couple, defective grab iron, or defective brake, the employer is absolutely liable for all resulting injury and the defenses of contributory negligence and assupmtion of risk do not apply. Affolder v. NYC & St. L. Ry. Co., 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); Coray v. Southern Pacific, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

The courts of Ohio have not consistently treated section 4955.32 and 4955.34. The first case to interpret section 4955.32 was Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66 (1877). The Supreme Court of Ohio noted, in analyzing 4955.32, that proof of contributory negligence could negate the railroad's negligence. However no case has reached the Ohio Supreme Court since 1926 on this section. Additionally the argument presented by plaintiff combining as it does 4955.32 and 4955.34 has never been raised in any court of this state. The court is, therefore, faced with a matter of first impression. The defendant has cited two cases from the Court of Appeals for the sixth Circuit, Newcomb v. Baltimore & Ohio R.R. Co., 352 F.2d 406 (6th Cir. 1965) and McCluskey v. Norfolk & Western R.R., 408 F.2d 1025 (6th Cir. 1969), cert. den. 396 U.S. 831, 90 S.Ct. 83, 24 L.Ed.2d 81 (1969). These cases seem to indicate that failure to sound the statutory signal did not prevent the operation of the rule that plaintiff's negligence (or that of his decedent) barred recovery. However, the Court of Appeals was not faced with the question presented herein. Those concerned whether a violation of Section 4955.32 was "negligence per se" to which the plaintiff's contributory negligence could bar recovery, and thus are not precedent.

Subsequent to the decisions of the Sixth Circuit Court of Appeals, and the most recent case on the closely analogous statute, 4955.33, is McCallie v. New York Central R.R. Co., 23 Ohio App.2d 152 261 N.E.2d 179 (Lorain County Court of Appeals, 1969). Section 4955.33 reads:

> "At all points where its railroad crosses a public road at a common grade, each company shall erect a sign with large and distinct letters placed on it to give notice of the proximity of the railroad and to warn persons to be on the lookout for the locomotive. A company which neglects or refuses to comply with this section is laible in damages for all injuries which occur to persons or property from such neglect or refusal."

This case was not appealed to the Ohio Supreme Court. The Court of Appeals held that ORC 4955.33 placed absolute liability upon a railroad company for damages proximately resulting to persons or property for a failure to maintain a "crossbuck" sign at a railroad crossing and, therefore, precluded contributory negligence as a defense to an action brought for a violation of this section.

While there have been numerous opinions rendered by Ohio courts and by federal courts sitting in diversity which have entered final judgment against a plaintiff driver even where the railroad has been adjudged negligent in failing to sound a horn signal, it seems that prior to this case no plaintiff has sought relief for the statutory violation rather than in cause of action for negligence.

[6] While section 4955.33 includes the strict liability terms, such words are not present in 4955.32. By its terms 4955.32 creates a specific safety statute, the violation of which is negligence per se. However, section 4955.34 and 4955.32 must be read together since the terms of 4955.34 refer to and provide the strict liability for section 4955.32.

The language of 4955.34 that " . . . The company in whose employ such engineer or person in charge of an

engine is, as well as the person himself, is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person" is identical to other strict liability statutes and will be so viewed by this court.

As the Ninth District Court of Appeals said in *McCallie* supra at 159, 261 N.E.2d at 184:

> "In the instant case, we have a statutory direction to perform a duty, coupled with a liability in damages for a failure to perform. Negligence is not an ingredient of such performance, and, as we have shown in a similar statute, without an element of negligence or the opportunity to be negligent in performance, contributory negligence cannot exist."

Accordingly, the defense of contributory negligence is not available as a defense to an action based on violation of sections 4955.32 and 4955.34, and that these statutes provide for strict liability.

It is so ordered.

APPENDIX E

No. 73-1545

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEVORNE GLINSEY, ADM'X, ET AL.,
Plaintiffs-Appellees,

v.

BALTIMORE & OHIO RAILROAD CO.,
Defendant-Appellant.

Appeal From The United States District Court For The Northern District of Ohio Eastern Division

---

Decided and Filed April 16, 1974.

Before: Edwards, Celebrezze, and McCree, Circuit Judges.

Celebrezze, Circuit Judge. This is an appeal from a judgment against Appellant in the amounts of $135,000 for the estate of Willie Glinsey and $20,000 for James Glinsey. Federal jurisdiction is founded on diversity of citizenship. The case arose from a railroad-highway crossing accident, in which Willie Glinsey was killed and James Glinsey was injured. The collision occurred on December 5, 1969, at 9:30 p.m., in a light industrial and residential area of Elyria, Ohio.

Appellees James Glinsey and Levorne Glinsey, administratrix of Willie Glinsey's estate, sued the Baltimore & Ohio Railroad Company, claiming that the

train which struck the Glinsey's car had failed to blow its whistle and sound its bell as required under an Ohio statute, thus causing the accident. Before trial, Appelles filed a motion *in limine*, seeking to exclude evidence that Willie Glinsey may have been intoxicated and that the Glinseys' car may have been stolen.

At a pre-trial conference Appellees argued that such evidence was not relevant because section 4955.34, Ohio Rev. Code,[1] imposes absolute liability and deprives a railroad which has violated section 4955.32 of the defense of contributory negligence,. By arguing that section 4955.34 imposes such a liability, Appellees were employing a legal theory which apparently had not been urged upon an Ohio state court. The District Court agreed with Appellees and imposed "strict liability" on Appellant, thus excluding evidence of the driver's conduct.[2] The District Court ruled that, as a matter of law, the train's failure to sound its whistle and bell (if proven) was at least one proximate cause of the accident. The jury's role was thus relegated to

---

[1] All subsequent statutory citations are to the Ohio Revised Code.

[2] District Court Memorandum Opinion and Order, reported at 356 F.Supp. 984 (N.D. Ohio 1973.)

The District Court ruled that evidence Appellant would have presented concerning Appellees' conduct was legally inadequate to establish Appellees' conduct as the "sole proximate cause" of the accident. The proffered evidence was testimony that the driver had a 0.127 percent blood alcohol content, that the car contained wine and beer bottles, that the car was traveling around fifty miles per hour toward the crossing, and that the train's headlight was burning and would have been seen by an alert driver approaching from Appellees' direction.

determining whether the train had sounded its whistle and bell before striking the Glinseys' car. The jury decided against the B & O on this question.

Appellant asserts that the District Court committed several errors. The most significant alleged error stems from Appellant's contention that sections 4955.32 and 4955.34 do not deprive a railroad of the defense of contributory negligence. A second error asserted is that the District Court removed from the jury the question of proximate cause. Third, Appellant asserts that evidence should have been admitted to show that James Glinsey was engaged in a joint enterprise with driver Willie Glinsey, so as to impute the driver's alleged negligence to the passenger. Fourth, Appellant asserts that Appellees' evidence concerning the failure to sound the bell and whistle should have been excluded. Fifth, Appellant challenges the District Court's jury instruction that Ohio law requires a train to sound its whistle from 80 to 100 rods from the crossing and continuously until the train has reached the crossing.

We deal first with Appellant's contentions conserning contributory negligence and proximate cause. Ohio law governs our answers to these questions, since the District Court has jurisdiction on the basis of diversity of citizenship. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). We must apply Ohio law as we believe the Ohio Supreme Court would state it, if it had the opportunity to do so in this case. *See Pomerantz v. Clark*, 101 F. Supp. 341, 344-45 (D. Mass. 1951); *Essex Universal Corp. v. Yates*, 305 F.2d 572, 580-82 (Friendly, . J., concurring) (2d Cir. 1962).

The statute invoked by Appellees states:

"Every company shall attach to each locomotive engine passing upon its railroad a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine in motion and approaching a turnpike, highway, or street crossing or private crossing where the view is obstructed by embankment, trees, curve, or other obstruction to view, upon the same line with the crossing and in like manner where the railroad crosses any other travel place, by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing and ring such bell continuously until the engine passes the crossing. §4955.32

"Every engineer or person in charge of an engine who fails to comply with section 4955.32 of the Revised Code is personally liable [to the state for a penalty from $50 to $100] – The company in whose employ such engineer or person in charge of an engine is, as well as the person himself, is liable in damages to a person or company injured in person or property by such neglect or act of such engineer or person. §4955.34

Thus, a railroad must blow its whistle at a certain distance from each crossing and ring its bell until it reaches the crossing. Section 4955.34 imposes liability in damages for injuries caused by a failure to do this.

These two sections were first interpreted in *Pennsylvania v. Rathgeb*, 32 Ohio St. 66 (1877), where the Ohio Supreme Court stated:

"It is evident from [the statutory] language that the failure to give signals must have occasioned the accident, that is, must have been the proximate cause of it before recovery can be had. The injury

must happen "by neglect" of the engineer. If it occurred from some other cause, liability can not arise therefrom, under that statute. Indeed, this statutory duty is not different in the responsibility it imposes upon railroad companies from that arising under the common law. Railroads must be careful. If they neglect this duty and such neglect occasions damage, they are responsible. But, though they may be negligent in some degree, if no damage arises, no liability exists. That is, if the injury complained of was not brought about by the negligence in question, but by something else not chargeable to the company, they can not be held.

Before, therefore, plaintiff can recover, because signals were not given, he must cause it to appear that this failure of duty brought about the disaster; for if his own imprudence was the moving cause, he can not maintain his action, although the company may not have observed the provisions of the statute."

The *Rathgeb* syllabus stated Ohio law:[3]

"Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and

[3]The Ohio Supreme Court states Ohio law only through its syllabi. Individual opinions of the justices do not carry precedential weight. *Thackery v. Helfrich*, 123 Ohio St. 334, 336 (1931). *See* 14 Ohio Jur. 2d §250. This rule does not apply to opinions from the Ohio Courts of Appeals. *See Carruthers v. Kennedy*, 121 Ohio St. 8, 166 N.E. 801 (1929); *Royal Indemnity Co. v. McFadden*, 65 Ohio App. 15, 29 N.E. 2d 180 (Ham. Co. 1940); *Parkview Hospital v. Hospital Service Ass'n.*, 8 Ohio App.2d 315, 222 N.E.2d 314 (Franklin Co. 1966); *Gustin v. Sun Life Assurance Co.*, 154 F.2d 961, 962 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

> seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avioding danger from an approaching train; and the ommission to do so, without a reasonable excuse therefor, is negligence and will defeat an action by such person for an injury to which such negligence contributed."

Subsequent Ohio decisions followed the *Rathgeb* holding, often finding as a matter of law that a plaintiff's failure to use "ordinary prudence" and his sight and hearing had been the cause of the accident, despite the railroad's failure to obey statutory or administrative duties.[4] *Baltimore & O. R.R. v. McIlyar*, 77 Ohio St. 391 (1908) (plaintiff landowner's refusal to allow railroad onto his property to mend fencing as required by statute "proximately contributed" to bring about the dangerous fencing, which later caused injury to plaintiff's horse); *Pennsylvania R.R. v. Rusynik*, 117 Ohio St. 530 (1927) (plaintiff "directly contributed" to the accident by failing to look for an approaching train); *Cobb v. Bushey*, 152 Ohio St. 136 (1949) (plaintiff's inattention in crossing the tracks was "the sole proximate cause" of the collision); *Capelle v. Baltimore & O. R.R.*, 136 Ohio St. 203 (1940) (plaintiff's negligence was "the approximate cause of the collision," with the railroad's statutory violation a "mere condition" of the accident); *Patton v. Pennsylvania R.R.*, 136 Ohio St. 159 (1939) (decedent's failure to exercise due care was "the proximate cause" of his death.)

[4] Railroads must comply with a host of safety requirements. *See* 46 Ohio Jur.2d §§256-275 (1961).

For a railroad's violation of a safety statute to have been "the proximate cause" of an accident, it must be shown that the accident would not have occurred if the railroad had met its obligations. Thus, if a driver would not have avoided an accident, even if the train had fulfilled its legal duties, the railroad would not be liable for injuries suffered, since its legal violation would not have been the proximate cause of the accident. *North v. Pennsylvania R.R.* 9 Ohio St. 2d 169 (1967); *Zumets v. Baltimore & O. R.R.*, 27 Ohio St. 2d 71 (1971).

Of course, it is not clear from the face of the Ohio whistle-bell statute whether this conclusion mandates a contributory negligence instruction or merely requires a plaintiff to prove proximate causation. The Ohio Supreme Court has, however, resolved this question. *See Rathgeb, supra.* In *Bahm v. Pittsburgh & L.E. R.R.*, 6 Ohio St.2d 66 (1966), the Court reaffirmed that contributory negligence was a defense. However, the Court pointed out that it would not constitute a defense if a plaintiff had been only slightly negligent. The Court's syllabus stated:

> "Use of the phrase 'in the slightest degree,' or the phrase, 'in any degree,' in connection with contributory negligence in a charge to a jury constitutes prejudicial error whether the phrase pertains to the issue of proximate cause or to the issue of negligence itself."

In 1971 the Ohio Supreme Court reaffirmed this view in another railroad crossing case, where the Court said:

> "The driver of a motor vehicle about to pass over a railroad grade crossing on a public highway is required both to look and to listen for approach-

> ing trains, and the looking and listening must be at such time and place and in such manner as to be effective for that purpose. Where the uncontrovertible physical facts demonstrate that plaintiff's decedent did not so do, then such failure on his part was a proximate cause of the collision as a matter of law. *North v. Pennsylvania Rd. Co.* (1967), 9 Ohio St. 2d 169; *Boles v. Baltimore & Ohio Rd. Co.* (1959), 168 Ohio St. 551." *Zuments v. Baltimore & O. R.R.*, 27 Ohio St.2d 71, 72 (1971).

In *North v. Pennsylvania R.R.*, the Ohio Supreme Court reversed the Court of Appeals, affirming the trial court's grant of summary judgment to the railroad on grounds of contributory negligence.

The syllabus in *North* provided:

> "The driver of a motor vehicle, about to pass over a railroad grade or crossing on a public street, must exercise his senses of sight and hearing to discover whether trains are also about to pass over such crossing, and such exercise of the senses must be made at such time and place as to be effective for the purpose. (Syllabus of *Boles v. Baltimore & Ohio Rd. Co.*, 168 Ohio St. 551, approved and followed.)" *North v. Pennsylvania R.R.*, 9 Ohio St. 2d 169 (1967).

Given this wealth of Ohio judicial support for the concept of contributory negligence in railroad crossing cases, we conclude that the District Court erred in denying an instruction on that defense and in excluding evidence to bolster the railroad's contentions to that end. Appellee's novel argument would have us discard a century of case law that has weaved contributory negligence into the tapestry of Ohio railroad accident

law. We do not believe that the Ohio Supreme Court would do this, despite the force of Appellee's argument, and we may not do that which we believe Ohio's highest court would refuse to do.

Thus we reject Appellees' contention that the recent case of *McCallie v. New York Central R.R.*, 23 Ohio App.2d 152 (Lorain Co. Ct.App. 1969), dictates a contrary conclusion. In *McCallie*, an Ohio Court of Appeals held that section 4955.33 (failure to maintain a "crossbuck" sign at a crossing) imposes absolute liability for damages . . . and, hence, precludes contributory negligence as a defense to an action brought for a violation of such section." The *McCallie* case, heavily relied upon by the District Court, deal with a statutory obligation requiring railroads to give what may be the only visual notice a driver has that he is approaching a railroad crossing. Without such notice a driver cannot always be expected to be on the lookout for an approaching train, so that his failure to be alert in the absence of a warning that he should be alert may properly be irrelevant to his right to recover. When a railroad fails to blow its whistle and ring its bell, however, a driver may still be warned of an approaching train by a shining headlight or a properly maintained warning sign. Furthermore, the *McCallie* court itself recognized that "negligence and contributory negligence" are issues under section 4955.32 and 4955.34. Thus, no significant support exists for Appellees' contention that Ohio law precludes a defense of

contributory negligence in cases concerning the whistle-bell statute.[5]

We point out, however, that the defense of contributory negligence itself may be overcome if the plaintiff is able to show "a reasonable excuse" for failing to discover an approaching train. *Rathgeb* syllabus, 32 Ohio St. at 66. One is not charged with a duty to hear a whistle that has not been sounded or see a train which cannot be seen. Given evidence that no warning sounds were given and that there were obstructions along the highway to obscure the train from the driver's view, the jury could believe that the Glinseys exercised ordinary prudence in approaching the crossing and that the train's failure to sound its whistle or bell was the proximate cause of the accident. *Sturgell v. Detroit, T. & I. R.R.*, Ohio App. 5, N.E.2d 477 (Pike Co. 1958); *Cleveland C. & C. R.R. v. Crawford*, 24 Ohio St. 631 (1874). "[A] person to whom a duty of care is owing may assume that it will

[5]Were we sitting in a court with authority to interpret Ohio law, we might find Appellees' arguments persuasive. The same basic consideration in *McCallie* ("a statutory discretion to perform a duty, coupled with a liability in damages for a failure to perform that duty") precluded a contributory negligence defense under section 4955.33 exists under sections 4955.32 and 4955.34. Furthermore, if contributory negligence is not precluded by the final sentence in section 4955.34, then it seems to be surplusage, since under ordinary negligence law a plaintiff's situation would be identical without the presence of that sentence. We are, however, limited to a best estimate of what the Ohio Supreme Court would do if it could consider Appellees' contentions. Our best estimate is that the Ohio Supreme Court would reaffirm its prior holdings rather than accept Appellees' point of view.

be performed, so that failure to anticipate negligence does not operate to defeat an action for injuries sustained." 16 Ohio Jur.2d Railroads §351 (1961). *See Meek v Pennsylvania Co.*, 38 Ohio St. 632 (1883); *Hart v. Devereaux*, 41 Ohio St. 565 (1885). In short, "if a traveler, acting as a reasonably prudent person is misled by the absence of signals or warnings required of a railroad company into believing that he might cross the tracks in safety and is struck by a train while attempting to do so, he is not precluded from recovering damages." 46 Ohio Jur. 2d *Railroads* §353, p.387 (1961). *See Schweinfurth v. Cleveland, C., C. & S. Ry.*, 60 Ohio St. 215, 54 N.E. 89 (1899); *Cleveland, C. C. & S. Ry. v. Kuhl*, 123 Ohio St. 552, 176 N.E. 222 (1931).

Thus, the District Court's denial of a directed verdict for the railroad was proper. The disputes concerning Appellees' ability to see the approaching train's headlight, the presence of warning signs, and related issues should be submitted to the jury for factual resolution.

Because we remand for a new trial on the issues of proximate causation and contributory negligence, we see no reason to respond to several other of Appellants' objections. One point, however, cannot escape our attention, because of its patent erroneousness. The District Court charged the jury that Ohio law requires that

> "both the horn or whistle and bell must be continuously sounded until such engine passes the crossing . . . Accordingly, if you find in this case that the engineer Johnson failed to either ring his bell for the full 1320 or more feet, or that he

> failed to continue to sound his horn while his train covered the 1320 feet up to and over the Parmely Road crossing, then you must thereby find that the railroad has violated Ohio law . . . ."

This charge was incorrect because it interprets Ohio law to require that the train's whistle (or horn) be sounded continuously for the entire distance of 1320 feet to the crossing.

Section 4955.32 states " . . . [T]he engineer . . . shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing and ring such bell continuously until the engine passes the crossing." the language of this section attaches one condition to the blowing of the whistle and one requirement to the ringing of the bell. The whistle's sounding must occur between 80 and 100 rods from the crossing. The bell ringing must be continuous from that point. The whistle need not be blown continuously. *Pennsylvania R.R. v. Stegaman*, 22 F.2d 69 (6th Cir. 1927). Appellees argue that the *Stegaman* result was overruled in 1953, when the Ohio Revised Code replaced the General Code. The general Code provision had a comma between "from such crossing" and "ring such bell continuously," making explicit the application of "continuously" solely to the ringing of the bell. An argument that the Ohio legislature intended to change the railroad's whistle requirement by removing a comma, when the change occurred amidst the wholesale structure and grammatical revision of Ohio's statutory laws, is frivolous. In fact, the Revised Code simply corrected the grammatical error in the General Code section, since a comma should ordinarily not be

inserted between two verbs when they are conjoined by the word "and".

The judgment is reversed, and the cause is remanded for a new trial, to be conducted in conformance with this opinion.

APPENDIX F

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

PAMELA KAY CARNAHAN, et al., *Plaintiffs,*	)	
	)	
	)	FINDING & ORDER
vs.	)	
	)	
AKRON-BARBERTON BELTLINE RAILROAD, et al, *Defendants.*	)	
	)	
	)	
	)	

This cause came on to be heard upon Plaintiff's Motion to Strike, filed herein on October 23, 1973. The motion asks the Court to strike all defenses respecting contributory negligence on the grounds that such defences are not available to an alleged violation of Sections 4955.32 and 4955.34.

Counsel for both parties have requested the Court to rule upon the motion even though the case of *Glinsey v B. & O. Railroad*, 356 F. Supp. 924, is pending on appeal to the U.S. Sixth Circuit Court of Appeals and that case is directly on point with the issues at hand.

The first question presented is whether this is an issue of first impression in the State Courts of Ohio. Do sections 4955.32 and 4955.34, O.R.C. when considered together impose strict liability against railroads? If not,

then the numerous Ohio Supreme Court cases cited by defendant in its Response to Plaintiff's Motion to Strike would compel this Court to overrule the motion.

The trial judge in *Glinsey*, supra, concluded, presumably after exhaustive research by his staff, that the consideration of both statutes together did present an issue of first impression. This Court finds that there is no Ohio case which specifically discusses the combined effect of the statutes in the myriad of reported authorities cited by defendant or otherwise. Granted, there are many cases deciding the effect of section 4955.32, O.R.C. singularly.

Therefore, the Court concludes that the issue raised is indeed a matter of first impression to which the Court may direct his own judgment.

However, it is worthy of note that the foundation upon which the Court in *Glinsey* based his reasoning is the case of *McCallie, Admx. v. N.Y. Central R.R. Co.* 23 O App (2d) 152, 5200 (2d) 180, decided by the Ninth District Court of Appeals of Ohio. That Court, in turn, found an analagous rationale arising from the interpretation of the Ohio "dog bite" statute, confirmed by the Supreme Court of Ohio in *Dragonette v. Brandes*, 135 O.S. 223, 14 O.O. 61.

For some unknown reason, the Ohio Supreme Court did not pass upon the decision in *McCallie*, supra, leaving it standing.

Therefore this Court must decide whether to accept and follow the lead of *Glinsey* and *McCallie* courts or reject those decisions on the theory that other Ohio Courts have indicated that the ultimately decided rule will be that the affect of these combined statutes does not establish strict liability on the railroads.

When confronted with that choice, the Court believes that unless there is an obvious fallacy in the reasoning of the forefront courts, or their decisions fly in the face of acceptable public policy, then the nature of the judicial process dictates following in their path.

The Court accepts the logic of the aforementioned courts and will comment, without intending to give the impression of legislating in any manner, that in view of the untold accidents occurring at railroad crossings it would seem to be not unduly harsh policy to strictly require the soundings of warnings by railroad locomotives.

But in any event, the Court finds that sections 4955.32 and 4955.34 provide for strict liability when considered together and jointly.

Accordingly, the defense of contributory negligence in not available and the Motion to Strike is sustained.

So ordered. Exceptions to defendant.

/s/ John W. Reece

JUDGE JOHN W. REECE

cc: Attorney A. William Zavarello
Attorney Richard Aughenbaugh
File.

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Supreme Court of the United States

October Term, 1974

No. 74-290

MAXINE W. SIEGFERTH, Guardian of ROBERT H. SIEGFERTH, an Incompetent Person, *et al.*,
Petitioners,

v.

BALTIMORE & OHIO RAILROAD CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DONALD J. LYNN
ELDON S. WRIGHT
C. KENNETH CLARK, JR.
1200 Mahoning Bank Building
Youngstown, Ohio 44503
Attorneys for Respondent

Of Counsel:
HARRINGTON, HUXLEY & SMITH
1200 Mahoning Bank Building
Youngstown, Ohio 44503

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Supreme Court of the United States

October Term, 1974

No. 74-290

MAXINE W. SIEGFERTH, Guardian of ROBERT H. SIEGFERTH, an Incompetent Person, *et al.*,
Petitioners.

v.

BALTIMORE & OHIO RAILROAD CO.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The decision of the Court of Appeals in this case has been reported. *Siegferth v. Baltimore & Ohio Railroad Co.*, 498 F.2d 392 (6th Cir. 1974).

ADDITIONAL STATUTES INVOLVED

Ohio Revised Code Section 2503.20

When requested by the supreme court, the reporter of the supreme court shall attend its sessions and consultations and shall report and prepare its decisions for publication under its direction. Such reporter shall prepare for publication and edit, tabulate, and index those opinions and decisions of any court of appeals furnished him for publication by any such court, and such opinions and decisions of any of the inferior courts, as may be designated by him and approved by the chief justice of the supreme court.

No cases in the court of appeals shall be reported for publication except those selected by the several courts of appeals, or by a majority of the judges thereof. Such reporter may, with the consent of the supreme court, appoint assistants necessary to carry on the work of his office. The compensation of each of such assistants shall not exceed two thousand dollars a year, to be paid out of the state treasury upon the warrant of the auditor of state.

Whenever a case is reported for publication, the syllabus of such case shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court. Such report may be per curiam, or if an opinion is reported, such opinion shall be written in as concise form as may be consistent with a clear presentation of the law of the case. Opinions for permanent publication in book form shall be furnished to the reporter and to no other person. After August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court.

Act of March 25, 1872 (69 Ohio Laws 49):

AN ACT

To prevent accidents by Railroads

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That any railroad in this state using steam locomotive engine for the transportation of passengers and freight, shall be required to have attached to each and every such engine passing upon the road, a bell of the ordinary size now in use on locomotive engines, and a steam whistle; and it is hereby made the duty of the engineer, or person in charge of any engine when in motion and approaching any turnpike, highway or town road crossing upon the same level therewith, and in like manner when the road crosses any other traveled place by bridge or otherwise, to sound such whistle at a distance of at least eighty and no farther than one hundred rods from the place of such crossing, and ring such bell continuously until the engine and cars attached thereto shall have passed such road crossing or crossings: Provided, however, that nothing herein shall interfere with the proper observance of any ordinance passed by any city in this state, regulating the management of railroad locomotives and steam whistles thereon, within the limits of such city.

SECTION 2. That every engineer, or person in charge of any such engine, who shall fail to comply with the provisions of the first section of this act, shall be personally liable therefor to a penalty of not less than fifty dollars, nor more than one hundred dollars, to be recovered by civil action, at the suit of the state of Ohio, in the court of common pleas of any county where any such crossing exists; and the company in whose employ such engineer, or person in charge of an engine, may be, as well as the person himself, shall be liable in damages to any person or company who may be injured in person or property by the neglect or act of said engineer or person in

charge of an engine as aforesaid; and such engineer or person in charge of an engine shall also, in case any person be killed by reason of his neglect or failure to comply with the provisions of the section aforesaid, or in case any person sustain bodily injury, not affecting life by reason thereof, then such engineer or person in charge of an engine, as aforesaid, shall be considered guilty of a misdemeanor, and shall, on conviction thereof in the proper court of the county where such bodily injury occurred, be imprisoned in the jail of the county not less than one nor more than twenty months, or be fined in any sum not more than five hundred dollars, or both, at the discretion of the court.

* * * * *

(This Act is the statutory predecessor to Ohio Revised Code Sections 4955.32 and 4955.34.)

COUNTERSTATEMENT OF THE CASE

This action grows out of an accident which occurred at about 4 P.M. on December 23, 1969 when Robert H. Siegferth, alone in his car, was driving west on Smith Road in Northampton Township, Summit County, Ohio, and collided with a Baltimore and Ohio Railroad Company freight train which was coming from his right, southbound from Cleveland to Akron.

The action was brought by Mr. Siegferth's wife and guardian, Maxine W. Siegferth, for his injuries and for her loss of consortium and support. The case was submitted to a jury which rendered a verdict in favor of the defendant, The Baltimore and Ohio Railroad Company. The Court of Appeals for the Sixth Circuit affirmed the jury verdict. Mrs. Siegferth has filed this petition from that decision.

Although the railroad tracks curved toward the east some distance north of the crossing, there is a sight view

north along the tracks of 529 feet from a point in the center of Smith Road 30 feet east of the east rail of the crossing (A-120). At a point 20 feet east of the east rail the unobstructed sight view is 630 feet (A-119). A whistle post is located along the tracks 1,381 feet north of the crossing (A-122).

The train crew testified that when this southbound train, proceeding at approximately 35 miles per hour (A-54), reached the whistle post, the engineer turned on the bell, started blowing the whistle, and continued to blow the whistle until the crossing was reached (A-59, 102). An outside witness, Paul Ringler, who was completing a telephone conversation in a clubhouse southeast of the crossing, became aware of the train whistle 12 to 15 seconds before the accident (A-164) and heard the whistle blow 3 or 4 times (A-162).

The Railroad fireman who was sitting on the left side of the engine (A-87) saw Mr. Siegferth's westbound car come up to the crossing, stop approximately 15 feet back from the track, and then accelerate and shoot in front of the train (A-92).

Mrs. Nellie Nickson, an eastbound motorist who was called by petitioners as their witness, testified that she had observed the approaching train when she crossed the tracks some seconds earlier. Mrs. Nickson stopped her car some distance east of the crossing and blinked her headlights at an approaching westbound car to warn the driver that a train was coming. After that car went past her she turned her head and watched as it went across the crossing (A-80-82). She then blinked her headlights at a second approaching car, the one being driven by Mr. Siegferth (A-82). She testified:

> "Q. After the second car passed you, did you turn right around and watch it?

"A. Yes, I turned around.

"Q. And did it go up onto the tracks?

"A. All I could see when I turned around the train was hitting the car.

"Q. You mean it just happened that fast?

"A. Yes, it did." (A-82)

There was evidence that on the day preceding the accident the train crew had been on duty for 16 hours (A-98), and that after being relieved from duty the crew had spent an additional 1 hour and 20 minutes deadheading into Cleveland with a new crew, where they were marked off pay at 3:20 A.M. (A-110). There was conflicting evidence indicating the crew may have been on duty as much as 19 hours and 20 minutes on that preceding day, ending at 3:20 A.M. (A-48). After their arrival in Cleveland the crew had 10 hours off duty (A-49). The crew members slept in Cleveland and were wakened about 1 hour before reporting back for duty at 1:20 P.M. on the day of the accident (A-49, 60, 99). The crew had been on duty for only about 2 hours and 40 minutes when the accident occurred at 4 P.M. (A-46), and there was no evidence that any member of the crew was tired at the time of the accident and no evidence that the previous day's work had any relationship to the accident.

In her complaint (A-2) plaintiff alleged various acts of misconduct by the defendant, including that "Defendant failed to duly sound its whistle and ring its bell as its locomotive approached said railroad crossing." The complaint did *not* allege any violation of the Federal Hours of Service Act, 45 U.S.C. § 62.

In its answer (A-8) the defendant denied all allegations of misconduct, and alleged that the accident was caused by the negligence of Robert H. Siegferth.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Determined that the Law of Ohio as Set Forth by the Ohio Supreme Court Permits Contributory Negligence as a Defense to an Allegation that a Railroad Whistle and Bell were not Sounded.

The decision of the Court of Appeals in the present case was based upon the decision of the same court in *Glinsey v. Baltimore and Ohio Railroad Co.*, 495 F.2d 565 (6th Cir. 1974), and Section 1 of the petition herein is an attack on the *Glinsey* decision. A petition for writ of certiorari from the *Glinsey* decision is presently pending in this Court as Case No. 74-186.

Contrary to petitioners' assertion, the decision in *Glinsey* correctly followed the rulings of the Ohio Supreme Court and the reported decisions of the Ohio Courts of Appeals in holding that contributory negligence is a defense which may be raised in an action brought under the Ohio whistle statutes, Ohio Revised Code Sections 4955.32 and 4955.34.

Nearly 100 years ago the Ohio Supreme Court first considered the effect of the predecessor of those two statutes, then known as 69 Ohio L. 49, in *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66 (1877). In that case the Ohio court specifically considered the effect of the language now found in Revised Code Section 4955.34 which petitioners contend precludes the defense of contributory negligence, and explicitly held that the statute does not impose absolute liability upon a Railroad for its violation. In analyzing the statute the Supreme Court said:

> "It may be assumed that the signals were not given as the train approached the crossing. The statute, 69 Ohio L. 49, requires that whistle and bell shall be used, from eighty to one hundred rods from the

crossing, the bell to continue ringing until the road is passed. If these injunctions are not complied with, the statute provides that the company shall be liable in damages to any person injured 'by the neglect or act of said engineer or person in charge of the engine.' i.e., in failing to give the signals.

"It is evident from this language that the failure to give signals must have occasioned the accident, that is, must have been the proximate cause of it before recovery can be had. The injury must happen 'by neglect' of the engineer. If it occurred from some other cause, liability cannot arise therefor, under that statute. Indeed, this statutory duty is not different in the responsibility it imposes upon railroad companies from that arising under the common law. Railroads must be careful. If they neglect this duty and such neglect occasions damage, they are responsible. But, though they may be negligent in some degree, if no damage arises, no liability exists. That is, if the injury complained of was not brought about by the negligence in question, but by something else not chargeable to the company, they cannot be held.

"Before, therefore, plaintiff can recover, because signals were not given, he must cause it to appear that this failure of duty brought about the disaster; for if his own imprudence was the moving cause, he cannot maintain his action, although the company may not have observed the provisions of the statute.

* * * * *

"We think the law must now be considered as well settled, that the traveler approaching a crossing must be upon the lookout for danger. Ordinary care requires that he must look and listen to see if a train is in the vicinity, and if he fails in this, it is not merely evidence of negligence to be considered by the jury, it is itself such negligence as will prevent a recovery." (Pages 71, 72, 73)

That contributory negligence is a defense where the statutory signals have not been given was repeated by the

Ohio Supreme Court in *Pennsylvania Railroad Company v. Rusynik*, 117 Ohio St. 530 (1927), in which the Supreme Court stated:

> "Our attention is called to the statutory violation of the plaintiff in error in failing to give the signals required by law in approaching the crossing, and it is urged that this is negligence *per se*. The case of *Schell v. DuBois, Admr.*, 94 Ohio St. 93, 113 N.E. 664, L.R.A., 1917A, 710 is relied upon, but it is to be noted that the defendant is liable for such violation, provided an injury proximately caused thereby is not directly contributed to by the injured person." (Page 539)

The Ohio Supreme Court has consistently and frequently held that the driver of a motor vehicle about to pass over a railroad grade crossing on a public highway is required both to look and to listen for approaching trains, and the looking and listening must be at such time and place and in such manner as to be effective for that purpose, and that failure by a motorist to do so constitutes contributory negligence, barring his recovery whether or not the Railroad sounded the statutory signals. For examples, see *North v. Pennsylvania R.R.*, 9 Ohio St. 2d 169 (1967); *Tidd v. New York Cent. R.R.*, 132 Ohio St. 531 (1937); *Pennsylvania R.R. v. Moses*, 125 Ohio St. 621 (1932); *Detroit, T. & I. R.R. v. Rohrs*, 114 Ohio St. 493 (1926); and *Cleveland, C., C. & St. L. Ry. v. Lee*, 111 Ohio St. 391 (1924); as well as *Pennsylvania R.R. v. Rusynik, supra*, 117 Ohio St. 530 (1927) and *Pennsylvania Co. v. Rathgeb, supra*, 32 Ohio St. 66 (1877).

The Ohio Courts of Appeals have consistently reached the same conclusion. For examples, see *Stormont v. New York Cent. R.R.*, 1 Ohio App. 2d 414 (Franklin Cty. 1964); *Hall v. New York Cent. R.R.*, 111 Ohio App. 5 (Huron Cty. 1960); *Farmer v. Pittsburgh, C., C. & St.*

L. Ry., 83 Ohio App. 321 (Darke Cty. 1947); *Ballmer v. Pennsylvania Rd. Co.*, 59 Ohio App. 221 (Lucas Cty. 1938); and *Benschoter v. New York Cent. R.R.*, 30 Ohio App. 276 (Lucas Cty. 1928).

There is no reported Ohio decision to the contrary. Despite petitioners' assertion, the Ohio law is not in "a state of flux." There is no reason to believe that the Ohio Supreme Court would depart from the established rule that contributory negligence is a defense to an action alleging a violation of Ohio's whistle statutes.

As support for their position petitioners assert two cases, *McCallie v. New York Central R.R.*, 23 Ohio App. 2d 152 (Lorain Cty. 1969), and the unreported decision in *Carnahan v. Akron-Barberton Beltline R.R.* (Common Pleas, Summit County, 1973), neither of which is authority for petitioners' proposition.

McCallie did not involve the Ohio whistle statutes (Ohio Revised Code Sections 4955.32 and 4955.34). Instead, it dealt with a different provision of the Ohio Revised Code, Section 4955.33, which requires a crossbuck sign at a crossing. The *McCallie* decision specifically recognized that its reasoning did not apply to cases involving the whistle statutes, stating that "negligence and contributory negligence are issues that may arise" in cases based on the failure of an engineer to sound a warning.

The unreported Common Pleas Court decision in *Carnahan v. Akron-Barberton Beltline R.R.* is strikingly similar to the South Carolina Common Pleas decision which this Court held was not binding upon the Court of Appeals in *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948). The *Carnahan* decision was made in reliance upon the District Court decision in *Glinsey v. Baltimore and Ohio Railroad Co.*, 356 F. Supp. 984 (N.D. Ohio 1973) which was itself reversed by the

Court of Appeals for the Sixth Circuit. Petitioners' position that the *Carnahan* decision should have prevented the Court of Appeals from reversing the District Court's decision in *Glinsey* is a bootstrap argument. The *Carnahan* decision is unreported. As this Court said in *King v. Order of United Commercial Travelers of America, supra:*

> "To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered." (Pages 161-162)

But, unlike the situation presented in *King*, there is an Ohio statute, Ohio Revised Code Section 2503.20, which provides that the official reporter of the Ohio Supreme Court shall prepare for publication "such opinions and decisions of any of the inferior courts, as may be designated by him and approved by the chief justice of the supreme court." That section then goes on to provide:

> "* * *all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court."

The *Carnahan* decision was not reported either officially or unofficially and under Ohio Revised Code Section 2503.20 it has no precedential value. See *Bevan v. Century Realty Co.*, 64 Ohio App. 58 (Mahoning Cty. 1940), *app. dismissed*, 136 Ohio St. 549 (1940).

This Court's decision in *King* that such a state Common Pleas Court decision is not binding upon the Court of Appeals was restated by this Court in *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456 (1967), and there

are numerous decisions by the Courts of Appeals recognizing that such unreported lower court decisions are not binding. For examples, see *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2nd Cir. 1967); *Gerr v. Emrick*, 283 F.2d 293 (3rd Cir. 1960), *cert. denied*, 365 U.S. 817 (1961); *Roland Electrical Co. v. Black*, 163 F.2d 417 (4th Cir. 1947), *cert denied*, 333 U.S. 854 (1948); *American Fidelity and Casualty Co. v. Indemnity Insurance Co. of North America*, 308 F.2d 697 (6th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963); and *Village of Brooten v. Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961).

The Court of Appeals in *Glinsey v. Baltimore and Ohio Railroad Co.*, 495 F.2d 565 (6th Cir. 1974), *supra*, did not, as petitioners suggest, refuse to follow the current Ohio law. Instead, the Court of Appeals in that decision carefully considered Ohio's whistle statutes and based its determination of Ohio law upon the numerous decisions of the Ohio Supreme Court which hold that contributory negligence is a defense in cases such as the one presented. In its decision the Court of Appeals stated:

> "Of course, it is not clear from the face of the Ohio whistle-bell statute whether this conclusion mandates a contributory negligence instruction or merely requires a plaintiff to prove proximate causation. The Ohio Supreme Court has, however, resolved this question. See *Rathgeb*, *supra*.
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> * * * * *
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> "Given this wealth of Ohio judicial support for the concept of contributory negligence in railroad crossing cases, we conclude that the District Court erred in denying an instruction on that defense and in excluding evidence to bolster the railroad's contentions to that end. Appellee's novel argument would have us discard a century of case law that has weaved contributory negligence into the tapestry of Ohio railroad accident law. We do not believe that the Ohio

Supreme Court would do this, despite the force of Appellee's argument, and we may not do that which we believe Ohio's highest court would refuse to do."

In view of the careful analysis by the Court of Appeals in *Glinsey* of Ohio law, the numerous Ohio authorities supporting the conclusion reached in *Glinsey* and the complete absence of any authority having precedential effect to the contrary, we respectfully suggest that this Court should follow its general policy and "accept the determination of local law by the Court of Appeals." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

II. There Was No Issue in This Case Concerning the Hours of Service Act, and the Trial Court Correctly Refused to Instruct the Jury that a Violation of Such Act Imposes Absolute Liability in a Case Brought by One Who Is Not An Employee.

The complaint in this action did not allege any violation of the Hours of Service Act, 45 U.S.C. § 62. There was no evidence before the jury of any relationship between the accident and the number of hours worked on the previous day by the Railroad crew, and there was no issue for the jury to consider concerning that Act.

The petitioners submitted a proposed instruction to the jury, stating that the Railroad had violated the Act and directing a verdict for the plaintiffs, without consideration of contributory negligence, if such violation was a direct or proximate cause of the collision (A-165)

But the Hours of Service Act does not result in such absolute liability or in the elimination of contributory negligence as a defense in cases not brought by an employee. The Act contains no liability provisions itself. As Mr. Jus-

tice Holmes stated in *Atchison, Topeka and Santa Fe Railroad v. Swearingen*, 239 U.S. 340 (1915):

> "The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the hours of labor act itself, but the subsequent employers' liability act of April 22, 1908, (now 45 U.S.C. Sec. 53)."

The defense of contributory negligence is precluded only in actions brought by an employee, and then only by virtue of the Federal Employers' Liability Act, 45 U.S.C. Sec. 53. That statute, by its terms, applies only to "an employee."

The Hours of Service Act is analogous to the Safety Appliance Act, 45 U.S.C. Sec. 2. That Act, like the Hours of Service Act, did not create a Federal cause of action for either employees or non-employees seeking damages for injuries resulting from a railroad's violation of the Act. In actions by employees under either Act, the defense of contributory negligence is precluded by virtue of the Employers' Liability Act. In a case brought by a non-employee under the Safety Appliance Act, *Crane v. Cedar Rapids & Iowa City Railroad Company*, 395 U.S. 164 (1969), this Court carefully distinguished between the rights of an employee and the rights of a non-employee in such actions. The Court stated:

> "In such actions, the injured employee is required to prove only the statutory violation and thus is relieved of the burden of proving negligence, * * * He is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act, 45 U.S.C. §51; * * * and the railroad is deprived of the defenses of contributory negligence and assumption of risk, 45 U.S.C. §§ 53, 54.
>
> "In contrast, the non-employee must look for his remedy to a common-law action in tort, which is to

say that he must sue in a state court, in the absence of diversity, to implement a state cause of action. * * * '[T]he right to recover damages sustained . . . through the breach of duty sprang from the principle of the common law . . . and was left to be enforced accordingly . . .' Moore v. C. & O. R. Co., supra, at 215, 78 L. Ed at 762. In consequence, we have consistently held that under the present statutory scheme the definition of causation and the availability of the defenses of assumption of risk and contributory negligence are left to state law. Schlemmer v. Buffalo, R. & P. R. Co., 220 US 590, 55 L Ed 596, 31 S Ct. 561 (1911); Fairport, P. & E. R. Co. v. Meredith, supra, at 598, 78 L Ed at 1451; Moore v. C. & O. R. Co., supra, at 215, 78 L Ed at 762; Tipton v. Atchison, T. & S. F. R. Co., 298 US 141, 80 L Ed 1091, 56 S Ct. 715, 104 ALR 831 (1936). Our examination of the relevant legislative materials convinces us that this line of decisions should be reaffirmed."

This Court's reasoning in *Crane* is equally applicable where a violation of the Hours of Service Act is alleged.

Petitioners' argument that a violation of the Hours of Service Act imposes absolute liability in a case brought by a non-employee is based upon a false analogy to other statutes which contain language not comparable to that of the Hours of Service Act or the Federal Employers' Liability Act. For instance, the petitioners rely upon the Death on the High Seas Act, 46 U.S.C. § 761, *et seq.*, and cases decided under it. But in writing that Act Congress did not limit its benefits to "an employee" as in the Federal Employers' Liability Act, and, instead, specifically made the Act applicable to the death of "a person" (46 U.S.C. § 761). And Congress did not eliminate the defense of contributory negligence in that Act. Rather, it provided in 46 U.S.C. § 766 that the Court may reduce the recovery depending on the degree of negligence attributable to the

decedent. Subject to any constitutional limitations upon its power, Congress could have made the provisions of the Federal Employers' Liability Act applicable to an injury to "a person" but chose not to do so and made the Act applicable only to injuries to "an employee."

The cases cited by the petitioners relating to the power of the Courts to provide remedies under the Securities Exchange Act of 1934 (*J. I. Case v. Borak*, 377 U.S. 426 (1964)), and relating to the applicability of the Limitation Statutes, 46 U.S.C. § 183 and 46 U.S.C. § 192, to a carrier which had operated its ship in violation of the law (*The Delani*, 105 F.2d 413 (9th Cir. 1939)) have no apparent relationship to the question of whether contributory negligence may be asserted as a defense under the Hours of Service Act.

Finally, petitioners argue in Section III of their petition that it is an unreasonable and unconstitutional discrimination for Congress to eliminate the defense of contributory negligence or introduce the doctrine of comparative negligence in cases brought by railroad employees under the Federal Employers' Liability Act when Congress did not do the same thing in cases brought by non-employees.

If petitioners were correct in this astonishing assertion, the passage of the Federal Employers' Liability Act would have terminated the defense of contributory negligence and have introduced the comparative negligence doctrine in any claim made by any non-employee resulting from the negligence of a railroad employee, or the abrogation of the contributory negligence defense in cases brought by employees would be unconstitutional. We submit that there is nothing unreasonable about placing railroad employees in a different category, as respects claims for railroad related injuries, from members of the general public. The exposure of railroad employees to the risk of possible

injury is far greater than the exposure by members of the public at large to such risk of injury. This Court has held the classification to be reasonable. *Mondou v. New York, New Haven and Hartford R.R. Co.* 223 U.S. 1 (1912) Similar increased risk of injury in their job is faced by other industrial employees. As a result, workmen's compensation acts have been passed providing benefits for injured employees not available to members of the general public who suffer the same injury. Petitioners apparently would ask this Court to declare unconstitutional any benefits for injured workers not available to members of the public. Their argument would be completely without merit even if the Hours of Service Act were an issue in the present case.

We respectfully submit that the Hours of Service Act was not an issue in this case, and that in any event that Act does not abrogate the defense of contributory negligence in cases brought by non-employees.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DONALD J. LYNN
ELDON S. WRIGHT
C. KENNETH CLARK, JR.
1200 Mahoning Bank Building
Youngstown, Ohio 44503
Attorneys for Respondent

Of Counsel:
HARRINGTON, HUXLEY & SMITH
1200 Mahoning Bank Building
Youngstown, Ohio 44503

CERTIORARI DENIED